

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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|------------------------------------|---|----------------------------|
| BENSON DURUAKU | : | Civil No. 05-5285(KSH) |
| | : | |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | REPORT AND RECOMMENDATION |
| BRANCH BANKING & TRUST CO., et al. | : | as to defendants |
| | : | Panthaky and Alpha Funding |
| Defendant | : | |
| | : | |

This matter having come before the Court by way of letters dated November 2, 2006, November 9, 2006 and November 13, 2006, regarding defendant Branch Banking & Trust Company's request that the Court dismiss the Complaint against defendants Panthaky, and Alpha Funding without prejudice;

and the docket reflecting that the Complaint was filed on September 16, 2005¹, see Docket Entry No. 1;

and it appearing that the plaintiffs have not served these defendants;

and the Court having convened a conference on September 7, 2006 during which the Court raised the failure to serve these defendants;

and the Court having ordered that service on these defendants was to be effectuated by October 30, 2006, see Pretrial Scheduling Order, dated September 7, 2006;

and the Court being advised that service has not yet been effectuated;

and the plaintiffs did not submit a form of Order dismissing the Complaint as they were

¹The federal docket does not reflect the summonses directed to defendants Panthaky and Alpha Funding.

required to do;

and the plaintiffs advising that they do not oppose the entry of an Order dismissing the Complaint against defendant Alpha Funding without prejudice, see Letter of Kevin Fasic, dated November 9, 2006 at 1;

and the plaintiff asking that the Court defer dismissal at this time as to defendant Panthaky to allow them to serve discovery to attempt to ascertain his whereabouts;

and the Court finding that: (1) this request was made after the October 30, 2006 deadline (2) the plaintiffs have not presented good cause for requesting the adjustment of this pretrial deadline, see Fed. R. Civ. P. 16(b), and (3) the plaintiffs have provided no explanation as to why they did not pursue their investigation of defendant Panthaky's whereabouts during the one-year since the Complaint was filed and the two months since the Court convened the Rule 16 conference and set the October 30, 2006 deadline;

and the Court further finding that the defendants have not shown good cause to extend the 120-day service deadline set forth in Fed. R. Civ. P. 4 (M) as they have failed to identify efforts taken to serve defendant Panthaky, did not move for enlargement of the deadline until after the deadline the Court set passed, and the BBT defendants are prejudiced in that their challenges to subject matter jurisdiction have been unnecessary since the absence of defendants Panthaky and Alpha Funding will mean there is diversity jurisdiction and the subject matter challenge will be moot;

and based on these findings the Undersigned recommending that this United States District Judge enter the proposed order provided by defendant BBT with its letter dated November 2, 2006;

and for good cause shown,

IT IS on this 14th day of November, 2006

RECOMMENDED that the United States District Judge dismiss the Complaint against defendants Panthaky and Alpha Funding without prejudice. The parties have ten days from receipt of this recommendation to file and serve.

s/Patty Shwartz
UNITED STATES MAGISTRATE JUDGE